IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-227

FEDERAL POWER COMMISSION,

Petitioner,

v.

CONSUMER FEDERATION OF AMERICA, *et al.*,

Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:
ALBERT J. FRANCESE

F. BOSLEY CROWTHER 3rd
1515 Wilson Boulevard
Room 1111
Arlington, Virginia 22209

Counsel for American Gas Association
As Amicus Curiae

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I.

INTRODUCTORY STATEMENT

A. Statement of Position and Interest of Amicus Curiae

This brief *amicus curiae* is filed by the American Gas Association ("A.G.A."), pursuant to Rule 42(1) of the

Rules of the Supreme Court of the United States, in support of Solicitor General's Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Decision in *Consumer Federation of America et al. v. Federal Power Commission*, 515 F.2d 347, decided March 13, 1975. All parties to this action have consented to the filing of this brief.

A.G.A. is a non-stock, non-profit corporation incorporated under the laws of the State of Delaware. It is the national trade association for approximately 300 natural gas distribution and transmission companies serving customers in all 50 states. These companies serve nearly 90 percent of the natural gas customers in this country. Natural gas provides about one-third of our nation's total energy requirements and, when energy for transportation is excluded, more than 60 percent of the energy requirements for industry in the United States. The 900,000-mile pipeline network is the most efficient and economical energy delivery system presently available or foreseeable. This national network of pipes and mains, representing a total investment of some 50 billion dollars, serves some 160 million of our population.

Natural gas is the most efficient form of energy available in the United States for appropriate residential uses, according to the President's Council on Environmental Quality. It is also the least polluting fuel available, a fact which places it in great demand by industries concerned with achieving air quality standards; further, its burning characteristics make it irreplaceable for many industrial processes. Finally it is, and will continue to be one of our least expensive fuel resources because of the capital efficiency of the gas industry itself, as well as its transportation and

combustion efficiencies. It is, in short, a premium fuel for which great demands exist.

The Federal Power Commission (FPC) itself, in the instant proceeding, in a multitude of other cases prior to this case, and in other proceedings and reports since 1973 has recognized the existence of the supply deliverability problem, and the fact that the interstate consumer in particular has been placed at a severe disadvantage in competing for available gas supplies by the lack of pricing restraints upon intrastate customers in the producing states. It has adopted a variety of measures to deal with this problem, ranging from revision of pipeline tariffs to specify the rights and priorities of pipelines and their customers in curtailed supply situations, to the measures here at issue, designed to permit interstate consumers to compete on more equal footing for gas supplies available in the intrastate market.

At the present time, it is clear that demand for natural gas far exceeds the supplies dedicated to the interstate pipelines. Failure to remedy this situation could jeopardize the more than $30 billion of unamortized assets of the industry, as well as ultimately possibly rendering useless the multi-billion dollar investment of consumers in gas appliances and equipment. Since 1968, A.G.A. has been expressing publicly a concern about declining supply. In 1970, interstate pipelines for the first time were required to curtail contracted-for deliveries, and these curtailments reached a level of 13.58 percent in 1974.

The validity of FPC determinations of gas supply shortages is not here at issue, but is well documented by the findings and reports of other federal agencies of which this Court may take judicial notice. For example,

in 1974, according to the Federal Energy Administration, natural gas production declined for the first time, to 21.2 trillion cubic feet (Tcf), or almost 6 percent from the 1973 level of 22.5 Tcf. This is equivalent to over 230 million barrels of crude oil. The greatest impact will be on industry, especially fertilizer, food, glass, fiberglass, electric components and electric equipment, aluminum refractories and kilns, bearings, steel rolling mills and plastics. Consumers will feel the impact of the shortages in the form of higher prices charged them for goods and services produced using more costly petroleum fuels.

While the impact of the natural gas shortage will be minimized by the availability of Alaska and outer continental shelf reserves, the exploration, production, and distribution problems inherent in developing those reserves are substantial and will forestall delivery for a significant period of time.

The Federal Energy Administration reports that the nation's network of interstate gas pipelines will be short 1.3 Tcf of the 9.0 Tcf of gas needed for the November 1975 to March 1976 winter heating season or a shortage 30 percent greater than the nation endured last winter. On an annual basis, it has also been predicted that the nation will be short 2.9 Tcf of the approximately 20 Tcf it will need. This constitutes a cutback which is 45 percent worse than endured in 1974. See Federal Energy Administration, The Natural Gas Shortage: A Preliminary Report, August 28, 1975, at 3.

In the meantime, the shortage of natural gas will cause plant closures and loss of jobs in affected parts of the country and will generally contribute to adverse economic conditions. Ten or twelve states face severe

curtailments this winter. These include the mid-Atlantic states stretching from New York to South Carolina and several midwestern states, such as Ohio, West Virginia and Kentucky. Curtailments in these areas are primarily due to cutbacks by five interstate pipelines.[1] For example, United Gas Pipeline Co., Texas Eastern and TRANSCO incurred, respectively, 41.42 percent, 21.45 percent, and 27.70 percent curtailment of firm requirements for the year April 1974 - March 1975 and will incur a projected deficiency of 47.65 percent, 25.72 percent, and 40.53 percent, respectively, for the year April 1975 - March 1976. See FPC Press Release 21454, June 6, 1975, at Schedule I. Further, it is expected that these shortages will increase in the next few years.

The legislative and executive branches as well as cognizant administrative agencies, of states and the federal government are groping for long term solutions to the nation's natural gas crisis. There is no single answer. Regulatory innovation, such as at issue in *Consumer Federation*, and indeed pragmatic experimentation will be required to develop requisite curative devices.

B. Statement of the Case

The present case arises from Federal Power Commission Order No. 491, issued September 14, 1973,

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[1] Representing, according to FEA statistics, nearly 80% of the volume of projected curtailments are Columbia Gas Transmission Corp., El Paso Natural Gas Co., Texas Eastern Transmission Co., United Gas Pipeline Co., and Transcontinental Gas Pipeline Corp. (TRANSCO). FEA Preliminary Report, at 4.

which attempted to deal with projected gas shortages during the 1973-74 heating season. Order No. 491 extended from 60 to 180 days the exemption from the certification requirement of Section 7 of the Natural Gas Act of 1938 (the "Act") permitting short-term emergency sales of natural gas at prices above FPC area rates to pipelines experiencing or facing gas shortages or curtailments of service. The Commission indicated, however, that any such pipeline purchases would be subject to review under Sections 4 and 5 of the Act. After many procedural steps (set forth in the Solicitor General's petition), the order was finalized on November 2, 1973. Thereafter an appeal was taken to the Court of Appeals, which set aside Order No. 491 after which the instant Petition for Writ of Certiorari was filed. The Court of Appeals concluded that the FPC lacked the authority to promulgate Order No. 491 because the Section 7(c) exemption in the Act was never intended to include large, widespread deliveries of gas for up to 180 days without hearings and also because it violated the just and reasonable rate standard of Sections 4 and 5 of the Act.

II.

THE DECISION OF THE COURT OF APPEALS SHOULD BE REVIEWED UNDER A WRIT OF CERTIORARI FOR PURPOSES OF DECIDING THE IMPORTANT QUESTION OF THE AUTHORITY OF THE FEDERAL POWER COMMISSION TO DEAL WITH EMERGENCY SHORTAGES OF INTERSTATE PIPELINE GAS SUPPLIES.

A.G.A. believes that the Commission has the authority under Section 7(c) of the Act to exempt pricing of emergency gas sales from the normal certification requirements of Section 7, and that 180 days is not an unreasonable time for the FPC, in its discretion, to select and, with the exception noted below, the Commission properly exercised its discretion in the instant proceeding. In a period of grave national emergency, administrative agencies charged with responsibility for an area of national concern should be granted reasonable latitude to deal with the subjects of their expertise. It is most urgent, in view of the increasing shortages of natural gas since Order No. 491 was first promulgated, that this Court define this emergency authority under Section 7(c) of the Act to enable the FPC to deal with such matters.

On the other hand, it should be pointed out that one consequence of Order No. 491 is to cause the pipelines to assume the risk that the Commission in subsequent Section 4 or 5 proceedings might consider the price paid for these emergency purchases to be unjust or unreasonable. A.G.A. believes that this consequence is counterproductive, as a pipeline, even if faced with cur-

tailments will not be likely to buy gas that may be available at a premium if it runs the risk that it will not be able to recover its cost for such purchased gas.

III.

CONCLUSION

For the reasons set forth above, A.G.A., on behalf of its pipeline and distribution company members serving the public, respectfully submits that the Petition for a Writ of Certiorari to U.S. Court of Appeals for the District of Columbia Circuit should be granted and that the decision of the Court of Appeals should be reviewed by this Court.

Respectfully submitted,

F. BOSLEY CROWTHER, III
1515 Wilson Boulevard
Room 1111
Arlington, Virginia 22209

Counsel for Amicus Curiae
American Gas Association

Of Counsel:

ALBERT J. FRANCESE

Dated: September 10, 1975